

No. 12716

No. 12813

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION, *Appellant*

vs.

WILLIAM J. COGAN, *Appellee*

WILLIAM J. COGAN, *Appellant*

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET
RAILWAY COMPANY, ET AL., *Appellees*

CHARLES T. JONES, *Appellant*

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET
RAILWAY COMPANY, ET AL., *Appellees*

WILLIAM J. COGAN and CHARLES T. JONES, *Appellants*

vs.

SECURITIES AND EXCHANGE COMMISSION, MARKET STREET
RAILWAY COMPANY, ET AL., *Appellees*

**BRIEF FOR APPELLEE, STANDARD POWER AND
LIGHT CORPORATION**

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Statement of Jurisdiction

This is a consolidation of appeals by appellants, Cogan and Jones, from orders of the United States District

Court for the Northern District of California, Southern Division, dated respectively July 11, 1950 (P.R. 108-13)¹ and November 21, 1950 (R. 2-11), and by the Securities and Exchange Commission ("Commission") from certain portions of the July 11, 1950 order, both of which orders were entered pursuant to Section 11 (e) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79a, et seq.).

Appellee, Standard Power and Light Corporation ("Standard Power") is concerned only with the appeals by appellants, Cogan and Jones.

The District Court had jurisdiction of the subject matter of the proceedings under Sections 11 (e), 18 (f) and 25 of the Public Utility Holding Company Act of 1935 ("Act").

The jurisdiction of this Court is invoked under 28 U. S. C. 1291 and made applicable by Section 25 of the Public Utility Holding Company Act of 1935.

Statement of the Case

The appeals by Cogan and Jones question the approval by the Commission and the enforcement by orders of the court below, of Market Street Railway Company's ("Market Street") plan for liquidation and dissolution under Section 11 (e) of the Act, particularly with respect to the inclusion in said plan of a release to appellee, Standard Power in connection with a settlement made between Market Street and Standard Gas and Electric Company ("Standard Gas") of Market Street's claim arising out of allegedly fraudulent payments made by Market Street from 1926 to 1935 to Byllesby Engineer-

¹ "P.R." refers to the printed portion and "T.R." to the typewritten portion of the record in No. 12,716. "R" refers to the record in No. 12,813.

ing and Management Corporation ("Byllesby")² for management and supervisory services rendered by Byllesby to Market Street³ and the claim of Standard Gas against Market Street on an open account,⁴ on the ground that the settlement did not contemplate a release of Standard Power.

The parties may be identified as follows:

1. Market Street is a subsidiary of Standard Gas⁵ and was engaged in the operation of a street railway system in and about the City of San Francisco, California, until September 29, 1944, when it sold its operating properties to the City and County of San Francisco (P.R. 28, 37).

2. Standard Gas is a public utility holding company and, from 1926 to 1930, was the parent of Standard Power and from 1930 has been a subsidiary of Standard Power (P.R. 37, 49).

3. Standard Power is a public utility holding company and, between 1926 and 1930, was a subsidiary of Standard Gas and since 1930 has been the parent of Standard Gas (P.R. 49).

4. Byllesby was a subsidiary of Standard Gas and, during the years 1926 to 1935, rendered management and

² The name of this corporation was changed in 1935 to Public Utility Engineering and Service Corporation (P.R. 38).

³ Byllesby rendered management and supervisory services to Market Street from 1926 to 1935, during which period Market Street paid to Byllesby a total of \$1,187,500 for such services (P.R. 51-52). During the years 1926 to 1930 Standard Power had received from Byllesby \$270,000 out of these payments (P.R. 52-53). Standard Gas received a portion of these fees between 1930 and 1935 (P.R. 53-54).

⁴ Market Street was indebted to Standard Gas in the amount of \$707,189 on an open account; Market Street had accrued interest on the indebtedness at the rate of 4% and Standard Gas had accrued interest at the rate of 6% so that, as of December 31, 1947; Standard Gas claimed a total of \$1,111,494.67 and Market Street admitted to \$976,726.63 as of the same date (P.R. 29-30).

⁵ Market Street had first come into the Standard system in 1924 and 1925 (P.R. 48).

supervisory services to Market Street, pursuant to agreements made between Byllesby, Standard Gas, Standard Power and Market Street (P.R. 38, 50-51).

5. Appellant, Jones, is the owner of ten shares of Market Street Prior Preference stock out of 116,185 shares outstanding (T.R. 590, P.R. 9).

6. Appellant, Cogan, is an attorney who was retained by Russell M. Van Kirk and others, constituting a Protective Committee for the Prior Preference stock of Market Street ("Van Kirk Committee"),⁶ to initiate an investigation by the Commission as to transactions and relationships between Market Street, Byllesby, Standard Gas and its subsidiaries and affiliates for the purpose of ascertaining whether or not Market Street had a claim for alleged fraudulent overcharges made by Byllesby and who acted on behalf of the Van Kirk Committee in such proceedings before the Commission and in the negotiations leading to the settlement included in the Market Street plan and who was denied a fee by the Commission for his services because of his alleged misconduct in connection with such negotiations (P.R. 46, 59, 120-129, 203-205).⁷

In 1941 Standard Gas was directed, by order of the Commission, to dispose of its interests in Market Street (P.R. 37).

In or about 1947, the Van Kirk Committee was organ-

⁶ Cogan was subsequently discharged by the Committee (P.R. 227-228).

⁷ The Commission found that Cogan violated his duty to the stockholders whom he represented in soliciting a retainer from Standard Gas during the course of the settlement negotiations (P.R. 59-62).

ized and Cogan was retained to proceed against either Standard Gas, Byllesby, Standard Power or any of them or their respective officers and directors (P.R. 120; T.R. 469).

Pursuant to this retainer and on March 21, 1947 Cogan filed with the Commission a petition requesting, among other things, that the Commission direct an investigation of the matters set forth therein (P.R. 120-129), which consisted of allegations, among other things, that, since 1926, Standard Gas had actually controlled Market Street and had elected its directors and officers and that, in 1927, Standard Gas caused Market Street to enter into a contract with Byllesby for management services and to pay to Byllesby substantial sums thereunder for which Market Street received no benefit, and stating that petitioners proposed to institute an action against Standard Gas "and others," as a consequence of these charges (P.R. 123-24, 127-28).

In a memorandum filed by Cogan with the Commission in support of the aforesaid petition, Cogan stated that Mr. John Morris of the Public Utility Staff of the Commission recommended that the relief sought in the petition be denied and that the Committee's claim be tried in the action then pending in the United States District Court, Northern District of California, Southern Division, wherein Standard Gas was plaintiff and Market Street was defendant, and wherein Standard Gas had brought suit for the moneys due on the open account (P.R. 134, 141-142). Cogan's memorandum sets forth nine specific reasons (P.R. 142-144) why the Commission should take jurisdiction and concludes with a statement as follows:

“It would moreover be far preferable, if such fraud can be proven, that it be done in the forum which has been deciding the ultimate status of the Standard Gas system and eliminating the bad spots therefrom.” (P.R. 144).

The Commission granted the relief sought in Cogan's petition and, in May, 1947, ordered that public investigative hearings be held, pursuant to Sections 11a, 18a and 18b of the Act, with respect to transactions between Market Street, Standard Gas, Byllesby, and affiliated and subsidiary companies, and with respect to charges for management and supervisory services rendered to Market Street (H.C.A. Release No. 7425; P.R. 11) by affiliated companies.

Cogan made an “exhaustive examination” of the records and participated in these hearings extensively (P.R. 174, 203-205). Testimony was taken before the Commission between June and December, 1947 (P.R. 175). As Cogan put it, this proceeding “was equivalent to trying a hard fought case in any court * * *” (P.R. 204).

In or about July, 1947, the Van Kirk Committee filed with the Commission a Declaration, pursuant to Rule U-62, for permission to solicit proxies (P.R. 147-150). The Declaration stated that the “primary claim” made by the Committee is that Market Street paid upwards of \$1,000,000 for management fees to Byllesby by reason of the fact that Standard Gas controlled both of said corporations (P.R. 148). A proposed letter to Prior Preference Stockholders was filed with the Commission (P.R. 150-153), which referred to the investigative proceeding ordered by the Commission, and stated that the Committee had no motive in soliciting stockholders' participation other than the desire to present a united front to prevent Standard Gas from taking upwards of \$1,000,000 from the Market

Street treasury, and to compel Standard Gas "or any affiliate or subsidiary thereof" to pay to or for the Prior Preference Stockholders an appropriate sum as the evidence may indicate as properly due for moneys improperly paid out by Market Street for "alleged management fees" (P.R. 153).

On September 2, 1947, Cogan requested the issuance of subpoenas duces tecum addressed to Byllesby and to Standard Gas (P.R. 154-157). Apparently, Byllesby had moved to quash the subpoena issued against it and, in Cogan's memorandum in opposition to said motion (P.R. 157-167), he stated that the record before the Commission contained gross figures on receipts by Byllesby for management fees for the period 1919 to 1929, together with such breakdown as was available in 1932, and alleged that the "Standard system" had defrauded Market Street (P.R. 159). In his appendix to his memorandum, Cogan set forth twenty-three specific facts taken from the record and the exhibits in the investigative proceeding (P.R. 163-167), including the statement that Market Street paid to Byllesby \$1,565,000 from 1929 to 1935 for alleged management (P.R. 165), and that Byllesby paid to Standard Power from the money it received from Market Street the sum of \$270,000 between 1926 and 1929 (P.R. 166).

In January, 1947 Standard Gas had commenced an action in the United States District Court for the Northern District of California, Southern Division, against Market Street to recover the sum of \$1,069,063 allegedly due on the open account, together with interest as of that date (P.R. 10, 42). Market Street filed an answer in that action admitting its indebtedness to Standard Gas to the extent of the principal amount due plus some interest (P.R. 10). Lea Rosen, a prior preference stockholder of

Market Street, was granted leave to intervene and did intervene in that action (P.R. 10-11). She was represented by Milton Paulson, who also represented her on the investigative hearings (P.R. 47). This action was not prosecuted pending the investigative proceeding ordered by the Commission in May, 1947 (P.R. 42).

It appeared from the testimony taken on the investigative proceeding before the Commission that there was no dispute as between Market Street and Standard Gas with respect to the principal amount due on the open account (T.R. 97). The only dispute related to the interest rate, Standard Gas having accrued interest at the rate of 6% and Market Street at the rate of 4%, the latter in conformity with an order of the California Railroad Commission (T.R. 97, P.R. 48, 29-30).

The evidence further disclosed that Byllesby had assumed the management of Market Street in November, 1925 and that, in February 1927, had made a contract with Market Street whereby Byllesby undertook to render various services to Market Street for the period from January 1, 1927 to December 31, 1931 (P.R. 50). The contract provided for management and supervisory services consisting of, obtaining personnel, assistance in negotiating contracts and loans, purchase of merchandise at discount, supervision of auditing and accounting, local sales of securities, advertising and publicity, securing insurance and necessary property appraisals, and general availability for any other management matters, and for compensation at the rate of not more than 2½% of Market Street's gross revenues, and not less than \$150,000 annually (P.R. 50). This agreement was renewed on January 1, 1932 for a further period of five (5) years, but by mutual consent payments were discontinued on October 1, 1935, shortly after the Public Utility Holding Company Act was passed (P.R. 50).

During the period from 1926 to 1935, Market Street was charged \$1,562,500 by Byllesby for management and supervisory fees, of which sum \$375,000 was paid to Kahn for his services as President of Market Street, the balance of \$1,187,500 being for other services under the contract (P.R. 51-2). Standard Power had been paid the sum of \$270,000 by Byllesby during the years 1926 to 1929 inclusive out of the monies received by Byllesby from Market Street during these years (P.R. 52-53). After 1930, when Standard Power became the parent of Standard Gas, Byllesby paid a portion of these fees to Standard Gas for the years 1930 to 1935 inclusive (P.R. 50-51). It appeared from the testimony that Market Street was overcharged by Byllesby but that it is impossible to determine the amount of the overcharge because it is clear that Byllesby had rendered some valuable services (P.R. 55).

One of the chief difficulties encountered by the Commission was the fact that nearly everyone concerned with the transactions, which took place between 1926 and 1935, is dead and those who remain have no present recollection of what occurred, and the records for those years have, in most instances, been destroyed (P.R. 52). Kahn, who served as President of Market Street during this period, testified in the proceeding and "could recall few specific facts and was able to testify only in a general way" (P.R. 52).

During the course of the investigative proceeding, settlement negotiations were undertaken between Cogan on behalf of the Van Kirk Committee and Standard Gas and between Paulson on behalf of Rosen and Standard Gas (P.R. 12). These negotiations led to a settlement in December of 1947, whereby it was agreed, subject to the approval of the Commission and the District Court that

Market Street pay Standard Gas \$550,000 and Cogan, as attorney for the Van Kirk Committee, receive \$50,000 for his fees, one-half to be paid by Standard Gas and one-half by Market Street, and that the Van Kirk Committee be paid \$25,000, one-half by Standard Gas and one-half by Market Street, and that it be reimbursed by Market Street for its expenses in an amount not to exceed \$5,000 (P.R. 43).

These provisions of the settlement agreement together with the further provision that Market Street release Standard Gas from all liability "for any cause whatsoever", were incorporated into Market Street's Section 11(e) plan filed with the Commission in or about April, 1948 (P.R. 30-31) and the proceeding on the Market Street Section 11(e) plan was consolidated with the investigative proceeding then pending before the Commission and hearings were had in the consolidated proceeding (P.R. 38).

On September 30, 1949, the Commission rendered its Findings and Opinion (P.R. 35-66) wherein it approved the Market Street plan and the aforesaid settlement as incorporated therein, the approval being conditioned, however, upon the filing of an amendment to the plan, containing, among other things, an omission of any provision for the payment of a fee to Cogan and the reduction of the payment by Market Street to Standard Gas from \$550,000 to \$512,500 (the net amount of the settlement after deducting the portion of the fees payable by Standard Gas to Cogan and the Van Kirk Committee). The Commission disapproved the payment of any fee to Cogan for his services in connection with the settlement because it found from the testimony that, in negotiating the settlement, he had violated his obligation of undivided loyalty to the stockholders whom he represented in seeking a retainer from Standard Gas (P.R. 59).

On October 11, 1949, Cogan moved for a reargument (T.R. 557) which was later denied (P.R. 89).

On October 14, 1949, Cogan for the first time took the position that Standard Power was not included in the settlement and that he had a separate cause of action against Standard Power, when he caused to be commenced in the United States District Court for the District of New Jersey a derivative stockholders action against Standard Power for the recovery on behalf of Market Street of the sum of \$270,000, with interest, together with a reasonable counsel fee (P.R. 73-74). The theory of the law suit was that Standard Power had been unjustly enriched to that extent by its participation in the management fees charged by Byllesby to Market Street for the years 1926 to 1929 (P.R. 73-74). The plaintiffs in that action were appellant, Jones, and the surviving members of the Van Kirk Committee (P.R. 73).⁸

On or about December 8, 1949, Market Street filed its amended Section 11(e) plan in conformity with the Commission's September 30, 1949 Findings and Opinion (P.R. 67-85) and, because of Cogan's newly asserted theory of a separate cause of action against Standard Power and the law suit against Standard Power in New Jersey, the plan contained a provision for the delivery of a release by Market Street to Standard Gas and its subsidiaries "for any cause whatsoever" (P.R. 70, 73-74).

The Commission issued an order to show cause why the amended plan should not be approved (P.R. 19) and, after a hearing thereon, issued its Supplemental Findings and

⁸ On April 28, 1950, the surviving members of the Van Kirk Committee, who were plaintiffs in the New Jersey action, wrote to the Commission stating that they had not been consulted prior to Mr. Cogan's filing the complaint against Standard Power in that action and that the Committee would not countenance the use of its name without prior approval. The Committee further stated that it wished to withdraw its name from any legal actions brought in its name and that it approved the Market Street plan pending before the Commission (P.R. 227-228).

Opinion on March 9, 1950 (P.R. 86-94), wherein it reviewed its Findings and Opinion rendered on September 30, 1949, and the record upon which the same was based, and emphasized the fact that it had regarded the settlement as contemplating a final and complete disposition of any and all claims which Market Street might have, arising from the management fees paid to Byllesby during the years 1926 and 1935 (P.R. 91-92),⁹ and that the Commission had treated the plan "as one which was offered to

⁹ The Commission said:

"Whatever may be the present disagreement between Cogan and Standard Gas as to what each intended in their negotiations and their eventual settlement, their settlement was not accepted by us as a reason for approving the payment by Market Street to Standard Gas in the amount which we indicated in our prior Opinion could be found to be fair and equitable. In view of Cogan's activities we found it necessary in our prior Opinion to state that we were not accepting Cogan's negotiations as an indicium of fairness and pointed out that we had the duty to appraise the proposed payment independently. Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street and Standard Gas.³ The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request. In addition, the service charges during the entire period were the subject of attack by a prior preference stockholder who intervened in an action instituted by Standard Gas against Market Street on the open account claim and who was also a participant in these proceedings. Neither we nor the Court in that action, to which the settlement was presented before the plan was filed, was informed that any participant in the proceedings was reserving the right to make any part of the service charges the subject of independent proceedings. Although the settlement was reached before Standard Gas presented its case, it may nevertheless be noted that, so far as the record covered the point, Standard Gas made no disclaimer of responsibility for any other charges made by Byllesby Engineering, which was a subsidiary of Standard Gas throughout the entire period."

³ Cf. *North American Light & Power Company, et al.*, — S.E.C. — (1947). Holding Company Act Release No. 7514, plan approved and enforced, 74 F. Supp. 317 (D. Del., 1947), affirmed 170 F. 2d 924 (C.A. 3, 1948).

resolve all controversies between Market Street and Standard Gas and its subsidiaries, past and present, including Standard Power as a step in the final winding up and dissolution of Market Street” (P.R. 93-94).

And, to eliminate any possible confusion, the Commission in its March 9, 1950 Supplemental Findings and Opinion required as a further condition to its approval of the Market Street Section 11(e) plan that the plan be further amended “to provide clearly for a complete release of Standard Gas and its subsidiaries, including Standard Power” (P.R. 94).

An amendment conforming to this directive was incorporated into the plan filed by Market Street with the Commission in May, 1950 (P.R. 95-97). After a hearing thereon, the Commission entered its order approving the plan as amended as necessary and appropriate to effectuate the provisions of Section 11(b) of the Act and as a fair and equitable plan thereunder (P.R. 98-102).

The Commission in July 1950, applied to the court below for an order of enforcement of the Market Street plan, as required by the Act (P.R. 7-26) and, after a hearing thereon, the court below entered its order on July 11, 1950, holding that the Commission’s Findings and Opinion of September 30, 1949, and its Supplemental Findings and Opinion of March 9, 1950, were supported by substantial evidence and were arrived at in accordance with legal standards, except with respect to the denial of a fee to appellant, Cogan (P.R. 110-111).⁸ The court found the Market Street plan fair, equitable and appropriate to effectuate the provisions of Section 11 of the Act, except in so far as it failed to provide for compensation to appellant, Cogan (P.R. 111)⁹ and remanded the matter to

⁸ and ⁹ The Court also reserved decision on the fee of Milton Paulson pending reconsideration by the Commission (P.R. 111).

the Commission to fix an allowance to Cogan and to reconsider the allowance to Paulson (P.R. 111).

On September 1, 1950, Market Street filed with the Commission a modified amended plan in conformity with the order of the District Court (R. 70-78). The plan consisted of two steps, Step One containing the provisions of the plan already approved by the court, and Step Two relating to the Cogan fee denial, the fee to Paulson, and the final liquidation of Market Street (R. 78-99). The Commission approved Step One of the plan and the District Court entered its enforcement order on November 21, 1950 (R. 44-61, 1-11).

This appeal is a consolidation of the separate appeals by Cogan and Jones from the orders of the District Court entered on July 11, 1950 and November 21, 1950 respectively, and the appeal by the Commission from certain portions of the order of July 11, 1950 (R. 104-7).

Comments on Brief of Appellants, Cogan and Jones

The brief of appellants, Cogan and Jones, contains very few record references. It is difficult, and in many instances impossible, to verify the statements of fact in appellants' brief by reference to the record. Some statements of fact made in the brief do not appear to be contained in the record. It is, therefore, respectfully urged that the counterstatement of the case contained in appellants' said brief be in all respects disregarded by this Court.

SUMMARY OF ARGUMENT

1. The sole basis of objection by Cogan to the Market Street Section 11(e) plan and the inclusion therein of a release to Standard Power is the denial to Cogan of a fee.

2. Cogan's action against Standard Power in New Jersey was an attempt to compel payment of the fee denied him by the Commission and his contention that the settlement did not contemplate the inclusion of Market Street's claim against Standard Power has no other basis.

3. The Commission's determination with respect to the scope of the settlement and its desirability in connection with the Market Street 11(e) plan is properly supported by evidence and should not be disturbed by this Court.

4. The settlement, as incorporated in the Market Street plan and approved by the Commission and the court below, is supported by substantial evidence.

5. Adequate review was had in the court below.

6. The orders of the court below in so far as the same are appealed from by Cogan and Jones should be in all respects affirmed.

POINT I

The sole basis of objection by Cogan to the Market Street plan and the inclusion therein of a release to Standard Power is the denial to Cogan of a fee.

It may reasonably be inferred that the only reason for the Cogan and Jones appeals is the fact that the Commission has appealed from that part of the District Court's order of July 11, 1950, which remanded the matter to the Commission to fix an allowance to Cogan. It is doubtful that Cogan would have appealed if the Commission had not so appealed.¹⁰ Cogan is interested in a fee for his services in connection with the settlement and his objection to the Market Street plan stems entirely from the denial to him of this fee. In his argument in the enforcement proceeding in the District Court in July 1950, he said (T.R. 594):

“Oh, well, when I talk about the compromise settlement I am talking about them denying me a fee.”

In the proceeding on the return of the Commission's order to show cause why the Market Street plan as amended should not be approved, Cogan stated that he objected to the plan, “only in so far as my request for a fee is involved in the total” (T.R. 430). Again, in the same proceeding, Cogan stated his position unequivocally (T.R. 433):

“I say that the amended plan is not fair in that it fails to provide a fee or compensation to me for beneficial services rendered to Market Street Railway Company.”

¹⁰ The Commission's notice of appeal from the order of July 11, 1950 was filed on August 7, 1950 (P.R. 114). Cogan's notice of appeal was filed on September 7, 1950 (P.R. 115) and Jones' on September 15, 1950 (P.R. 119).

It is a fair statement that these appeals by Cogan and Jones are before this Court only because Cogan was denied a fee and the Commission has appealed from that portion of the July 11, 1950 order which remanded the proceeding to the Commission to fix a fee for Cogan.

POINT II

Cogan's action against Standard Power in New Jersey was an attempt to compel payment of the fee denied him by the Commission and his contention that the settlement did not contemplate the inclusion of Market Street's claim against Standard Power has no other basis.

At no point during the settlement negotiations or in the proceedings before the Commission did Cogan even intimate that he intended to exclude Market Street's claim against Standard Power from the settlement until he was denied a fee by the Commission (T.R. 557). Almost immediately after the fee denial, he caused the action in New Jersey to be commenced against Standard Power (T.R. 557) and he has since sought to support the position that the settlement did not contemplate the inclusion of Standard Power. The record, and particularly Cogan's own statements in the record, do not support him.

Cogan testified before the Commission that the original authorization from the Van Kirk Committee authorized him to proceed with any action he saw fit to institute against Standard Gas, Standard Power and Byllesby (T.R. 469).

The petition filed by Cogan on behalf of the Van Kirk Committee with the Commission (P.R. 120-129), which resulted in the investigative proceeding refers specifically to possible claims of Market Street arising out of allegedly

exorbitant payments made by Market Street to Byllesby for management services for the years 1926 to 1932 (P.R. 123).¹¹ It is apparent that Cogan's only reason for initiating this proceeding was to determine whether or not Market Street had a claim or cause of action arising out of the Byllesby arrangement. If it were found that such a claim did exist, Cogan was authorized to bring such proceedings as he might deem necessary against such party or parties as he thought advisable to enforce the claim (T.R. 469). Cogan and his Committee were solely and exclusively concerned with a claim or cause of action on behalf of Market Street.

The Commission's notice of and order for hearing, pursuant to the Act, directed that inquiry be made into and evidence be taken concerning the relationship, past and present, between Market Street and its associated and affiliated companies and the facts and circumstances concerning the management fees paid by Market Street to Byllesby (T.R. 522, P.R. 38).

At the inception of the investigative proceeding, there was no misunderstanding between the Commission and Cogan as to its scope and indeed this unanimity of understanding continued until Cogan was denied a fee by the Commission.

Cogan in his argument on the Commission hearing on the amended plan stated (T.R. 435):

“The record of investigation before the SEC showed that H. M. Byllesby & Company acquired an interest in Market Street Railway Company in November 1925, and was instrumental in diverting to Standard Power & Light Corporation the profits resulting from management fees to be charged

¹¹ The Commission's investigation covered payments made from 1926 to 1935, the entire period (P.R. 50-51). Standard Power received a total of \$270,000 from Byllesby during the years 1926 to 1929 inclusive (P.R. 52-53).

against Market Street Railway Company by Byllesby Engineering and Management Corporation, and that between 1926 and 1929, inclusive, Standard Power and Light Corporation received a total sum of \$270,000 as such profits."

Cogan agreed with the statement of fact in the Commission's Findings and Opinion of September 30, 1949 that, "considerable testimony was taken and documentary evidence adduced with respect to the relationship and transactions between Market Street Railway Company and Standard and its affiliates, past and present, and particularly, the services rendered to Market Street by Byllesby Engineering and creation and history of the open account were explored" (T.R. 443-444).

Thus there was no disagreement as to the scope of the investigative proceedings before the Commission. The Commission was concerned with, and Cogan was interested in, a possible claim on behalf of Market Street arising out of the payment of management fees to Byllesby.

The settlement negotiations between Cogan on behalf of the Van Kirk Committee and the representatives of Standard Gas were undertaken and concluded before the pending investigative proceedings were terminated and before Standard Gas had offered evidence as to the value of the services rendered by Byllesby (P.R. 177-178). The claims which were the subject of discussion and negotiation were (1) Market Street's claim arising out of the Byllesby management arrangement, and (2) Standard Gas' claim on the open account (P.R. 169, 171). Standard Gas' claim was against Market Street exclusively (P.R. 41-42, 169). Market Street's claim was against Byllesby who had rendered the services and charged the fees, and Standard Gas and Standard Power who had each received from Byllesby a portion of the fees charged (P.R. 49-53, 171). Market Street's claim was a single indivisible claim. Cogan's attempt to render it divisible and to segregate

a separate claim for Market Street against Standard Power is clearly a rationalization after the fact. This view is supported by his own admissions that the settlement negotiations covered the relationship back to 1926 and therefore the period when Standard Power participated in the fees charged by Byllesby (T.R. 438, 467).

In Cogan's argument on the Commission's hearing on the amended plan, he stated that he had not before disclosed his intention to bring suit against Standard Power because he was afraid that Milton Paulson might bring a similar suit (T.R. 440). He entertained some doubt himself as to whether he exercised good judgment in not making this disclosure (T.R. 440).

Cogan's position was that he had the Standard Power action "up my sleeve" (T.R. 725). His counsel on the argument of the enforcement proceeding in the District Court in July 1950, contended that Cogan was under no duty to disclose during the settlement negotiations that he did not intend the inclusion of Market Street's claim as against Standard Power and that his silence in this respect was entirely proper (T.R. 637-640).

The District Judge properly characterized as a "tricky deal" Cogan's attempt to exclude Standard Power from the settlement (T.R. 741).

It is quite apparent that Standard Power was included in the settlement negotiations and the settlement itself. Cogan himself stated that he discovered his cause of action against Standard Power while the investigative proceeding and the settlement negotiations were in progress (T.R. 409). He admitted that the settlement discussions with Standard Gas were concerned with overcharges to Market Street from 1926 to 1935 (T.R. 727). Mr. Appel, Vice President of Market Street (T.R. 392) testified that the settlement negotiations covered Market

Street's claim for management fees paid by Market Street from 1926 to 1935 (T.R. 393) and that the settlement contemplated a complete release of this claim (T.R. 394) including a release to Standard Power (T.R. 398). This was certainly Standard Gas' impression throughout the settlement negotiations (T.R. 474-475).

It is quite apparent that, if the New Jersey action is to survive, the settlement must fall; both cannot exist (T.R. 524). Market Street had one not two claims.

Cogan's position is a difficult one as far as Cogan is concerned. He wants a fee. If this Court sustains the Commission's appeal, he will be denied a fee. He, therefore, wants to preserve his action against Standard Power in order to keep alive the possibility of getting a fee through the medium of that action. In order to do this, he must admit his own lack of good faith in the settlement negotiations. There is obvious personal reluctance to make such an admission; therefore, he must deny the record as he has done and rely on the bare argument, unsupported by any facts, that Standard Power was not included in the settlement. He must recant his own many statements to the contrary in the record. His entire position is an anomalous one. As the District Judge pointed out, there is a patent inconsistency in Cogan's request for a fee for negotiating a settlement which he now disavows (T.R. 597).

Cogan's position is simply stated as follows: If the Market Street plan, which includes the settlement and a release to Standard Power, is approved, he is entitled to a fee; if he is not to get a fee, the plan should not be approved.

Thus it is quite clear that Cogan's sole grievance is that he has been denied a fee and the only purpose of the New Jersey action against Standard Power is to compel the payment of a fee.

POINT III

The Commission's determination with respect to the scope of the settlement and its desirability in connection with the Market Street 11(e) plan is properly supported by evidence and should not be disturbed by this court.

The petition, which resulted in the Commission's order directing an investigation into the Byllesby-Standard relationship, charged fraud on the part of these two companies, consisting of alleged exorbitant overcharges in management fees to Market Street (P.R. 120-129). The inquiry, as requested by the petition, concerned itself with management fees paid by Market Street to Byllesby from 1926 to 1935 (P.R. 123-124). Evidence was taken by the Commission in connection with these charges (P.R. 38, 175). It is therefore evident that in the investigative proceeding, the Commission was exclusively concerned with the determination as to whether Market Street was fraudulently overcharged by Byllesby for management services rendered Market Street from 1926 to 1935. It is likewise evident that this investigation was sought by Cogan and his Committee and ordered by the Commission for the purpose of determining whether Market Street had a claim as a result of these overcharges (P.R. 120-129). If Market Street was found to have a claim, it was apparent that such claim was against Byllesby, the immediate recipient of the payments, and possibly against Standard Gas and Standard Power for their respective participations in the overcharges.¹²

¹² Standard Power from 1926 to 1930; Standard Gas from 1930 to 1935 (P.R. 50-53).

These facts which are fully discussed in the Commission's Findings and Opinion of September 30, 1949 (P.R. 46-57) and its Supplemental Findings and Opinion of March 9, 1950 (P.R. 86-94), furnish in abundance the evidentiary basis for the Commission's determination that the settlement negotiations contemplated a settlement of Market Street's entire claim resulting from the Byllesby overcharges and a discharge of liability on the part of those who participated in the proceeds. This of necessity included Standard Power. Under the decisions, this determination should not be disturbed.

In *Mississippi Valley Barge Line Co. v. U. S.*, 292 U. S. 282, 287, 78 L. ed. 1260, 1265, the court, in connection with a determination of the Interstate Commerce Commission, said:

“The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.”

See also:

Virginia Stage Lines, Inc. v. U. S., 48 F. Supp. 79, 82 (Dist. Ct., W. D. Va., 1942);

Nat. Lab. Rel. Bd. v. Nevada Consol. Copper Corp., 316 U. S. 105, 106-107, 86 L. ed. 1305, 1307;

Rochester Telephone Corp. v. U. S., 307 U. S. 125, 139-140, 83 L. ed. 1147, 1157-1158;

Alton R. Co. v. U. S., 315 U. S. 15, 86 L. ed. 586.

The courts recognize that administrative bodies such as the Commission are charged with the responsibility and possess the technical skills and facilities for consideration and evaluation of the technical and complicated problems within their jurisdictional sphere. The courts have, there-

fore, properly given great weight to their determinations and are reluctant to disturb them in the absence of evident dereliction. *Conway v. Silesian-American Corp.*, 186 F. 2d 201, 202 (C.C.A. 2, 1950). The observations of that court are peculiarly applicable to the settlement here:

“Since decision here is so highly a matter of judgment, indeed of shrewd appraisal of what may be the possibilities of lengthy litigation as against an immediate smaller payment in hand, we obviously cannot find any sure or pat answer.”

In *Gray v. Powell*, 314 U. S. 402, 412, 86 L. ed. 301, 310, the court said:

“It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.”

As stated by the court in *Virginia Stage Lines Inc. v. U. S.*, 48 F. Supp. 79, 83 (*supra*), in referring to the Interstate Commerce Commission:

“The function of ‘weighing’ the evidence, therefore, remains peculiarly one for the Commission ‘appointed by law and informed by experience’, and not for the courts. *Alton Railroad Company v. United States*, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586; *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301.”

See also: *Finn v. Childs Co.*, 181 F. 2nd 431 (C.C.A. 2, 1950).

There is no basis in the record before this court for disturbing the Market Street Section 11(e) plan which was approved by the Commission and the District Court.

POINT IV

The settlement, as incorporated in the Market Street plan and approved by the Commission and the court below, is supported by substantial evidence.

The basis for appellants' objection to the Market Street plan as amended is, that the approval by the Commission of the inclusion of Standard Power in the Market Street release under the settlement agreement is not supported by substantial evidence. The record of proceedings before the Commission indicates quite clearly the extent of the evidence adduced in the investigative proceeding, which evidence brought into the record such facts as are available at the present time relating to the Market Street-Byllesby arrangement (P.R. 46-53). The record indicates quite clearly both from the evidence before the Commission and the details of Cogan's participation in the investigative proceedings, and the settlement negotiations, that the claim or cause of action as far as Market Street was concerned consisted of a single claim against Byllesby and, possibly, against those corporations which controlled Byllesby, namely Standard Gas and Standard Power. The Commission summed up the situation in its Supplemental Findings and Opinion, rendered on May 9, 1950 (P.R. 91-92):

“* * * Thus, in considering the plan, we had before us what constituted, in effect, an offer of settlement made unilaterally by Market Street as the proponent of a plan for its own dissolution. We were required under the circumstances of the case to treat that offer in the framework of the whole record then before us just as if there had been no agreement between stockholders of Market Street

and Standard Gas. The record before us embraced not only the hearings on the plan but a public investigation into relationships and transactions between Market Street, Standard Gas and Byllesby Engineering. An important objective of the investigation was the examination and analysis of the service charges paid by Market Street during the entire period of its history as a company in the Standard Gas system. The record establishes that Cogan, who now takes the position that he intended only to settle service charges reflected in the open account after 1930, put into evidence numerous documents and schedules and a mass of correspondence relating to the whole period from 1926 to 1935 and that most of this material was secured by Cogan as a result of subpoenas which we issued at his request."

As the Commission further stated, neither the Commission nor the California Court, where the Standard Gas action against Market Street was pending, were informed that any party to the settlement agreement had reserved the right to make "any part of the service charges the subject of independent proceedings" (P.R. 92).

It is significant that on the hearing before the Commission on the Market Street plan, which incorporated the settlement, there was no objection until the Commission rendered its decision denying Cogan a fee.¹³ From this point on, the only objections to the Market Street plan, the amendments to which included clarifying provisions suggested by the Commission to eliminate any possible doubt as to the scope of the settlement and the parties to be released, were made by Cogan and these objections stemmed quite clearly from the fact that he had been denied a fee (T.R. 430, 433).

¹³ Cogan sought approval of the Market Street plan before the Commission and approval of the settlement of the action pending in California (P.R. 168-179).

On the basis of the record before it, and there was no complaint by any party that the record was insufficient, the Commission properly concluded that the reduction of Market Street's indebtedness to Standard Gas and a complete release by Market Street to all of the parties directly or indirectly concerned with the Byllesby payments constituted a fair and equitable settlement and disposition of all existing claims (P.R. 86-94).

The settlement of claims is a recognized reorganization technique and the Commission would be deprived of the means of fulfilling its obligations if it were prevented from determining that complex claims be disposed of through settlement rather than "through long drawn out litigation, of which indefiniteness is an inherently detracting factor." *North American Light & Power Co.*, 170 F. 2d 924, 932 (C. C. A. 3, 1948); *Conway v. Silesian-American Corporation*, 186 F. 2d 201 (C. C. A. 2, 1950).

The Commission cannot be required to go through the motions of "adjudicating the very subject of the settlement" and the Commission's determination in this instance that the settlement, as reflected in the Market Street plan, as finally amended, was for the best interests of the parties, constitutes its ultimate findings and represents "a judgment based upon the consideration of all the imponderables involved in determining whether the proposed offer met the requirements of being fair, reasonable and adequate."¹⁴ *North American Light & Power Co.*, 170 F. 2d 924, 931, *supra*.

It was not the function of the Commission or of the court below to try the issues raised in the complaint in the New Jersey action against Standard Power. *Ladd*

¹⁴ The Commission stated that all parties recognized that, "prompt disposition was valuable in preventing the frittering away of the assets of this unproductive enterprise" (P.R. 56). Cogan regarded prompt liquidation of Market Street as being in the best interests of the stockholders (P.R. 178, 196).

v. *Brickley*, 158 F. 2d 212, 221 (C.C.A. 1, 1946); certiorari denied 330 U. S. 819; *North American Light & Power Co.*, 170 F. 2d 924, 932, *supra*.

Appellants, whose only real objection to the Market Street plan, as approved, is the denial of a fee to Cogan, present a very confused argument in support of their attempt to justify Cogan's newly acquired contention that it was not the intent of the parties to the settlement agreement to include a release to Standard Power as a part of the settlement. In appellants' brief (p. 42) it is argued that a cause of action arose in favor of Market Street against Standard Gas to recover management fees paid by Market Street from 1930 to 1935 in the principal sum of \$355,000 and that a similar cause of action arose for the overcharges in management fees during the years 1926 to 1929. Appellants' argument is that Standard Gas is liable for overcharges during 1930 to 1935 because it was then the direct recipient of these overcharges and that Standard Gas was liable for overcharges during 1926 to 1929 because during that period it "shared control" of Standard Power. Appellants' argument, therefore, is that Standard Gas was liable to Market Street for overcharges by Byllesby to Market Street throughout the entire period from 1926 to 1935. Appellants state unequivocally that that is Market Street's cause of action. It is elementary that only one recovery can be had on a single cause of action. Liability thereon may be joint or several or sole but, in no event, can more than one recovery be had. Appellants, recognizing this position as they do in their brief, defeat completely and fully their argument, which is at best merely rationalization, that Market Street had severable causes of action.

Thus, it clearly appears that appellants do not seriously contend that there was an absence of substantial evidence

before the Commission and the Court below to support the amended Market Street Plan, as approved. Appellants' sole quarrel, as far as this case is concerned, is exclusively with the Commission on the question of Cogan's fee and does not concern itself beyond this.

The courts have consistently held that the Commission's jurisdiction over a Section 11(e) reorganization is exclusive. *In re Electric Bond & Share Co.*, 80 F. Supp. 795 (S. D. N. Y. 1946); *In re Standard Power & Light Corp.* 48 F. Supp. 716 (D. C. Del. 1943); *Homewood et al. v. Standard Power & Light Corp.*, 55 F. Supp. 100 (D. C., Del. 1944).

POINT V

Adequate review was had in the court below.

The settlement phase of the Market Street Plan was before the District Court on two separate occasions, in July 1950 and November 1950. In the July 1950 enforcement proceeding, the evidentiary facts considered by the Commission in connection with its approval of the plan were elaborately detailed to the court by Mr. Isaacs who appeared for the Commission (T.R. 497-563; 662-712). Appellant Cogan and his counsel similarly detailed the evidentiary facts upon which Cogan and Jones relied in support of their objections to the enforcement of the settlement phase of the plan (T.R. 578-644; 712-735).

The court thus had before it the evidentiary facts relied upon by both sides.

The court rendered an oral decision from the bench at the conclusion of the argument (T.R. 739-745). The court, however, invited the submission of further material by any party to the proceeding (T.R. 744):

“If any counsel feel they want to submit anything further in connection with the matter that would make any material difference, I wouldn’t want to shut any of you off”.

Cogan took no exception to the court’s decision and expressed no desire to accept the court’s invitation for the submission of any further matter which he felt the court should specifically consider. It may fairly be stated that Cogan was satisfied with the result (T.R. 745-746) because of the reversal by the court of the Commission’s finding that Cogan was not entitled to a fee. In any event, Cogan, by his conduct in failing to take an exception to the court’s decision and in failing to request the court, pursuant to the court’s invitation, to reconsider certain phases of the evidence or to request consideration *de novo* of further evidence, has estopped himself from questioning the adequacy of consideration by the court below in connection with the settlement phase of the Market Street plan. The portions of the record hereinabove referred to create no conflict with the decision in *Universal Camera Corp. v. National Labor Relations Board*, 19 U. S. L. Week 4160 (U. S. Feb. 26, 1951), U. S. Sup. Ct. L. ed. Adv. Op. Vol. 95—No. 7, p. 304.

There is no substance to Cogan’s argument that there was inadequate judicial review by the court below. If, as Cogan argues, there was inadequate judicial review by the court below with respect to the settlement phase of the Market Street plan in the July 1950 enforcement proceeding, he must then admit that there was likewise inadequate judicial review with respect to that part of the plan which denied him a fee. If he is to be held to any measure of consistency, Cogan must then concede that the court below erred for lack of adequate judicial review in determining that he is entitled to a fee, and in remanding the

matter to the Commission to fix his fee, and he must further concede that the Commission's appeal to this court from that portion of the July 11, 1950 order, is proper and should be sustained. It is doubtful that Cogan would make this concession.

This argument by appellants Cogan and Jones, like all of the arguments urged upon this court by said appellants, reflects the difficulty Cogan encounters in attempting to urge disapproval of the Market Street plan as far as the settlement is concerned, and points quite clearly to the conclusion that appellants' Cogan and Jones sole grievance relates to the Cogan fee denial.

CONCLUSION

The orders of the court below, to the extent that the same are appealed from by appellants, Cogan and Jones, should be in all respects affirmed.

Respectfully submitted,

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